Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)**	**DOCKET NO. 16-CRB-0003-PR (2018-2022)**

THE SERVICES' JOINT REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR REHEARING TO CLARIFY THE REGULATIONS

Amazon Digital Services LLC ("Amazon"), Google Inc. ("Google"), Pandora Media, Inc. ("Pandora"), and Spotify USA Inc. ("Spotify") (collectively, the "Services") respectfully submit this reply in further support of their Joint Motion for Rehearing to Clarify the Regulations. As explained below, nothing in the Copyright Owners' Response to the Services' Joint Motion for Rehearing to Clarify the Regulations ("Opp.") undermines the need for the clarifications requested by the Services.

I. THE JUDGES SHOULD REJECT THE COPYRIGHT OWNERS' BELATED EFFORT TO CREATE REPORTING OBLIGATIONS FOR FRAUDULENT STREAMS

As part of their opposition, but for the first time in this proceeding, the Copyright Owners seek to impose new and potentially onerous record-keeping requirements on the Services so that the Copyright Owners can audit whether exclusions of Fraudulent Streams were done correctly. There is no basis for imposing this new requirement. As a procedural matter, it is improper to propose new record-keeping requirements for the first time in an opposition to a motion for rehearing. The Copyright Owners had ample opportunity to propose such a requirement prior to and during the hearing, but they chose not to do so. They did not even propose this new requirement as part of the other substantive changes sought in their own post-determination motion. It is too late to propose such new requirements now and improper to do so in response to a clarification proposed by the Services that has nothing to do with record-keeping.

As an evidentiary matter, these record-keeping requirements find no support in the record. The Copyright Owners do not even attempt to cite record evidence to support their uninformed speculation that imposing additional record-keeping requirements will require little to no extra-effort. Opp. at 6. To impose such additional requirements based on nothing more than the Copyright Owners' unsupported assertions would violate the basic requirement that a determination of the Copyright Royalty Judges "be supported by the written record." 17 U.S.C.

§ 803(c)(3). In any event, the Copyright Owners' apparent concern that the Services might intentionally over- or under-count Fraudulent Streams is, at best, far-fetched. The Services have no financial incentive to do so, as the total royalty payments made by the Services are unaffected by the number of Fraudulent Streams excluded from the per-work allocation process.

II. THE JUDGES SHOULD ADOPT THE SERVICES' PROPOSED CLARIFICATIONS TO THE DEFINITION OF "LICENSED ACTIVITY"

The Services proposed changes to make clear that activities that do not require a Section 115 mechanical license do not fall within the definition of "Licensed Activity." As discussed in the Services' Motion, the definition as currently drafted could be misinterpreted to include a set of activities far beyond those licensable pursuant to Section 115. Services' Mot. at 4. The Copyright Owners appear to misunderstand the intent of this proposed clarification, surmising that the purpose of the change is "to carve out direct licensing deals." Opp. at 3. This is incorrect, and their concern is easily addressed.

The Services agree with the Copyright Owners regarding the mechanics of the process used to calculate the total royalty pool and then allocate that pool to individual works. The Services also agree with the Copyright Owners that directly licensed works should be paid only once (pursuant to the terms of the applicable direct license) and that works not subject to a direct license should also be paid only once (through the statutory framework).

Any concern that the modification proposed by the Services is an effort to change the methodology for calculating the Section 115 total royalty pool to exclude activities for which the mechanical rights have been licensed directly (rather than merely to exclude activities that do not implicate mechanical rights at all) can be resolved by replacing the word "licensed" in the Services' proposed definition with the word "licensable." "Licensed Activity" would thus be defined as "Interactive Streams or Limited Downloads of musical works subject to Subparts C and D of this title, and licensable pursuant to 17 U.S.C. 115." Given that the Copyright Owners have not opposed the proposed definition on the basis that it excludes revenues earned from activities that do not require a mechanical license, and their concern about excluding directly licensed activity is solved by the Services' proposed modification, the Services respectfully urge the Judges to adopt the proposed definition of "Licensed Activity," as modified above.[1]

III. THE JUDGES SHOULD ADOPT THE SERVICES' PROPOSED CLARIFICATION TO THE DEFINITION OF "FAMILY PLAN"

In an effort to clarify the definition of "Family Plan," the Services proposed striking the word "discounted." Services' Mot. at 8. The Services' Motion made clear that without such a change, the definition of Family Plan is potentially confusing. Specifically, it invites assertions that a family plan that is priced at a higher absolute level than an individual subscription plan (for example, a family plan for six family members priced at $14.99 as against an individual plan priced at $9.99) is not "discounted" and, therefore, does not qualify as a Family Plan. Such an outcome cannot be what the Judges intended, and the Copyright Owners do not suggest otherwise.

The Copyright Owners do not actually challenge the Services' proposed modification. Instead, they seek to propose their own, unrelated modifications to set economic parameters for Family Plan pricing. Opp. at 6-8. This gambit is procedurally improper for the same reasons discussed above. The Copyright Owners had ample opportunity to propose the changes they now seek, both during the hearing and in their own Motion for Clarification. Nor is the proposed modification that the Copyright Owners belatedly offer supported by the record. Because their proposal to implement economic limitations on "Family Plans" was never raised by either side

[1] The same modification would address the Copyright Owners' concern with the Services' proposed clarification to the definition of Offering. Opp. at 4.

during the hearing, neither side had the opportunity to explore whether their proposed definition makes any economic sense. It should be rejected on that basis alone.

The Copyright Owners' stated concern with the Services' clarification of the definition of "Family Plan" is nonsensical. The premise of the Copyright Owners' objection appears to be that, should the Services' proposed modification be accepted, the Services will take advantage of a "discounted" mechanical-only floor while at the same time charging families higher subscription fees—all to the detriment of the Copyright Owners. Opp. at 6. But should the Services increase subscription prices for "Family Plans," the Copyright Owners would only stand to benefit. Because the new regulations call for the greater of a percentage of revenue and a percentage of TCC (subject, in certain circumstances, to a mechanical-only floor), if the subscription price charged for Family Plans goes up, the royalties for such plans can only go up.

Finally, the Copyright Owners' proposed changes to the definition of "Family Plan" are inconsistent with the Determination. As the Judges repeatedly made clear, allowing for price discrimination, including through the offering of family plans, is beneficial to both the Services and the Copyright Owners and therefore should be encouraged. *See, e.g.*, Determination at 17-22 & 34. The Copyright Owners' proposed changes are nothing more than a transparent effort to undermine the ability of the Services to engage in certain forms of flexible price discrimination.

IV. THE JUDGES SHOULD ADOPT THE SERVICES' PROPOSED INCORPORATION OF A DEFINED DUE DATE FOR PURPOSES OF ASSESSING LATE FEES

To avoid any ambiguity as to when royalty payments are due and to make it clear that service on an agent is sufficient for purposes of making a timely payment, the Services proposed explicitly incorporating Section 210.16(g)(1), *i.e.*, the portion of Section 210 that addresses both of these issues, into the late-fee provision. Services' Mot. at 9-10. As noted in the Services' Motion, this proposed addition mirrors the language in the existing regulations, 37 C.F.R. §

385.4, as well as the language that the Copyright Owners recently negotiated with the record labels when settling the Subpart A rates and terms. Despite justifying their request for late fees on the availability of late fees in Subpart A, and despite recently agreeing with record labels to this exact language for Subpart A, the Copyright Owners now claim that the modification to mirror the late fee language in Subpart A is confusing and unnecessary. They fail to explain, however, why this added language would create any misunderstandings. The opposite is true. The reference to Section 210.16(g)(1) clarifies when payment is due, thereby removing the possibility of disputes arising or late fees being unjustly assessed before monthly payments and annual true-up payments are actually due.

V. THE JUDGES SHOULD ADOPT THE SERVICES' PROPOSED CHANGES TO THE DEFINITION OF "SERVICE REVENUE"

The Copyright Owners take issue with the Services' proposed addition of "in Connection with an Offering" to subpart (3) of the definition of "Service Revenue." Opp. at 9-10. This proposed modification was made to clarify that advertising revenues having nothing to do with Offerings need not be included in the definition of Service Revenue, thereby ensuring that advertising revenue is treated in the same way as all other revenue associated with activities other than Offerings. In response, the Copyright Owners assert that this might be used to exclude certain advertising revenues. But that is exactly the point. Consistent with the treatment of bundles more generally, the Judges clearly intended to exclude those advertising revenues not associated with Offerings. The Services' proposed language is intended to make this point even clearer, and therefore it should be adopted.

CONCLUSION

For the foregoing reasons, and for those set forth in the Services opening papers, the Judges should grant the Services' Motion, as modified above.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on Monday, March 12, 2018 I provided a true and correct copy of the The Service's Joint Reply in Further Support of Their Motion for Rehearing to Clarify the Regulations to the following:

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